The Legal Trajectory of Aboriginal Rights and Resource Development

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Introduction

Over the past five years, in the cases that have been brought before them, Canadian courts have continued their work in interpreting the entrenched Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*.[1] Aboriginal and treaty rights are increasingly recognized as bearing on issues related to natural resource development and management. That reality offers enormous opportunities to Canada and to Aboriginal Canadians. Many Aboriginal communities would be enthusiastic participants in the development of Canada's natural resource economy, so long as they can have protections for certain core interests and can participate equitably in that natural resource economy. The Macdonald-Laurier Institute's series on Aboriginal Canada and the Natural Resource Economy is grounded in that opportunity and hope.[2]

At the same time, there are also possible futures that are very much less good. If matters do not develop in those positive ways, there is also the very real possibility that legal rights held by Aboriginal communities will pose barriers to natural resource development and to Canadian economic prosperity. That scenario could also feature recrimination between different communities and a breakdown of reconciliation processes.

Aside from those specific scenarios, there are also possibilities that judges developing the law in this area may develop it in ways that inadvertently pose problems. Government policy in this area is very heavily guided by the development of law in the courts, and the courts have little guidance in the constitutional text itself on how to develop the law in this area. As a result, there are special reasons why they should consider the policy impacts of their judgments when developing the section 35 case law. But many judges at the Supreme Court of Canada have little exposure to Canada's natural resource economy or to economic considerations more generally. There are real possibilities that they may inadvertently develop the law in ways that are well-meaning but that have unintended consequences.

The courts have been clear that one of their hopes is that Canadian governments will negotiate with Aboriginal communities to find outcomes that we can all live with. Treaty processes bearing on resource issues face their own challenges. One type of challenge arises when different sides of negotiation processes are very far apart in their expectations of what can be achieved through the negotiations and what their legal alternatives are. One way that challenge can arise is when court judgments are unclear and are interpreted very differently by different sides—or when different sides have different ideas of where the legal trajectory is going.

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[1] Section 35(1) of the *Constitution Act, 1982* provides that "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[2] There have now been a half dozen papers in this series: ____

This paper in Macdonald-Laurier Institute's series on Aboriginal Canada and the Natural Resource Economy seeks to take stock of the last five years, so as to further understanding for everyone. There is, frankly, a lot going on this area, and the next Part of the paper tries simply to set out some of the main developments in an accessible form.

Then, the paper turns to consider specifically several ongoing effects of the duty to consult doctrine, showing that it continues to facilitate some kinds of key developments but also raises real challenges. Thereafter, it turns to consider the impact of the major developments on Aboriginal title in recent case law, showing that these developments involve some major ongoing uncertainties that pose real challenges for all.

In terms of expectations of parties concerning the legal trajectory, there has come to be something of a myth over recent years that there has been an unbroken string of wins in the courts by Aboriginal communities in the context of resource issues. Bill Gallagher's comments about two hundred legal wins by Aboriginal communities have been important in waking up Canadians to the real legal power held by Aboriginal communities, but they have also inadvertently fed into this inaccurate myth.[3] John Ralston Saul has similarly repeated the story that Aboriginal communities have won "case after case" in the courts.[4]

Because we live in a country grounded in the rule of law, judicial decisions are important, and it is important for Canadians to realize the substance of Aboriginal and treaty rights. But people like John Ralston Saul—well-meaning as he no doubt is—peddle false mythology when they present the case law as all going one way. The courts have been nuanced in their decision-making, and both sides have had wins in the courts. Indeed, there have been some significant recent losses in the courts by Aboriginal communities that have over-reached, with these decisions likely to have negative impacts for those communities and other communities down the road.

So, after considering some key points on the duty to consult and on Aboriginal title, the paper turns to recent legal over-reaches by Aboriginal communities and the deeper significance of these over-reaches.

Finally, the paper turns to consider several emerging flashpoints. There are some very difficult questions ahead, and we need to hope that all Canadians approach these questions with good will, with sincerity, and with full consideration of policy implications. Taking account of both the developments outlined in earlier sections and these flashpoints, the last section of the paper offers policy recommendations oriented in several different directions.

Main Legal Developments Since 2010 on Aboriginal Rights and Resource Development

[3] Bill Gallagher's self-published *Resource Rulers in Canada: Fortune and Folly on Canada's Road to Resources* is a very informative book about the broad context, but his writing is mentioned by many as supporting the claim that there have been 150 or 200 successive wins in the courts by Aboriginal communities.

[4] John Ralston Saul, "Wake up to the comeback" (*Globe and Mail,* 9 August 2013).

It is not possible to think of the set of developments on Aboriginal rights and resource development over the past five years in terms of one simple trajectory. Rather, a series of interacting developments on different subject matters illustrate the complexity of this area of policy and the complex collision underway between constitutionalized Aboriginal rights and efforts at resource development. This section seeks just to set out a number of key developments—some better-known and some lesser-known—as background to the discussion and analysis that follows in this report.

There have been a series of key legal developments since 2010 on the duty to consult:

- In 2010, the Supreme Court of Canada's *Rio Tinto* decision revisited the duty to consult, clarified its application to administrative boards and tribunals, reaffirmed its forward-looking character, affirmed its application to early strategic decisions, and maintained uncertainty on its application to legislative action.[5]
- Also in 2010, in *Little Salmon,* the Supreme Court of Canada held that the duty to consult continues to exist outside the consultation duties specifically enunciated in a modern treaty.[6]
- In 2012, the Yukon Court of Appeal held that Yukon's free entry mining regime could not be maintained as it did not leave enough room for consultation prior to the staking of a claim. Leave to appeal was denied by the Supreme Court of Canada in 2013.[7]
- In 2012, a number of mining legislation amendments came into effect in Ontario so as to require prospectors and developers to engage in consultation. The statutory amendments rendered moot some litigation that arose from the absence of such provisions. Some Aboriginal community advocates are looking at the possibility of challenging the constitutionality of the legislation, arguing that it offers inadequate protections.
- In August 2014, the Federal Court of Appeal affirmed that consultation requirements had been met through a Joint Review Panel process concerning hydroelectric developments in Labrador at Muskrat Falls and Lower Churchill Falls, illustrating again the potential for an appropriate process to meet the requirements of the duty to consult.[8] That same idea was similarly affirmed in a December 2014 Federal Court decision concerning the Shell Jackpine mine expansion.[9]
- In December 2014, a trial court held in a complex judgment that parts of the legislative process may trigger the duty to consult and that the federal government ought to have consulted with the Mikisew Cree on Bill C-45.[10] An appeal was filed in January 2015.
- In January 2015, the Federal Court of Appeal affirmed an earlier trial decision that the Canada-China investment agreement does not trigger the duty to consult and insisting that speculative impacts on Aboriginal rights do not give rise to requirements for consultation.[11]

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[5] *Rio Tinto Alcan v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650.
[6] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 SCR 103.
[7] *Ross River Dena Council v. Government of Yukon,* 2012 YKCA 13, leave to appeal to SCC denied 19 September 2013.
[8] *Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189.
[9] *Adam v. Minister of the Environment,* 2014 FC 1185.
[10] *Courtoreille v. Canada (Governor General in Council)*, 2014 FC 1244.
[11] *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4.

- In April 2015, the Saskatchewan Court of Appeal offered the first appellate determination on whether an initial disposition of subsurface mineral rights triggers the duty to consult, holding that it does not.[12]
- In late 2015, the Federal Court of Appeal will hear a series of duty to consult issues raised against the Northern Gateway Pipeline.

Aboriginal title also has major potential impacts on resource development, and there have been key developments on Aboriginal title in this time period as well:

- In 2012, the British Columbia Court of Appeal largely quashed the Tsilhqot'in Aboriginal title claim, holding that established case law allowed title claims only to specific sites of intensive historic occupation.[13]
- In June 2014, the Supreme Court of Canada reversed that decision and granted a historic declaration of Aboriginal title in favour of the Tsilhqot'in Nation.[14] The decision has many facets that bear on a variety of resource development issues, and Aboriginal communities have responded in a variety of ways in the months since.
- In mid-April 2015, the British Columbia Court of Appeal held that it is possible for Aboriginal communities to sue private parties based on previously unproven Aboriginal title claims, setting the stage for a possible lawsuit against Alcan based on riparian rights allegedly stemming from Aboriginal title.[15] (The decision remains subject to possible appeal.)

Treaty rights issues that bear on resource development have also been developing over this time period.

- In 2010, the Supreme Court of Canada decided two major cases on the principles applying to interpretation of modern treaties.[16]
- In 2013, operating under their modern treaty agreement, the Nisga'a in northwestern British Columbia began establishing private home ownership within Nisga'a territory. Some Aboriginal communities have continued to try to pursue possibilities for private land ownership.
- In 2014, the Supreme Court of Canada decided the *Grassy Narrows* case in which it interpreted the "taking up" clause in the Victorian/numbered treaties and affirmed the primary provincial role in resource development decisions and possibility of provinces justifiably infringing on treaty rights.[17]
- While still Chief of the Federation of Saskatchewan Indian Nations (FSIN), Perry Bellegarde began raising arguments of "unfinished treaty business" and asserting Aboriginal claims to subsurface resources in the regions covered by the numbered treaties in order to seek a resource revenue sharing arrangement. He continued to press these

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[12] *Buffalo River Dene Nation v. Saskatchewan (Minister of Energy and Resources)*, 2015 SKCA 31.
[13] *William v. British Columbia*, 2012 BCCA 185.
[14] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 256.
[15] *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154.
[16] *Little Salmon, supra* note 6; *Quebec (Attorney General) v. Moses*, 2010 SCC 17. For a discussion of the treaty interpretation principles in these cases, see Dwight Newman, "Contractual and Covenantal Conceptions of Modern Treaty Interpretation" (2011) 54 SCLR (2d) 475.
[17] *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.

claims after being elected as National Chief of the Assembly of First Nations in December 2014.

- In August 2014, the Ontario Divisional Court held that Treaty 3 in northwestern Ontario does not create rights to resource revenue sharing or to shared decision-making and thus did not ground consultation obligations arising from such rights.[18] (The Wabauskang First Nation is appealing.)
- In December 2014, the Yukon Supreme Court struck down the Yukon government's approach to the Peel River watershed as inconsistent with modern treaties with the territory's First Nations, which the Court read purposively.[19] (The Yukon government is appealing.) Weeks later, in January 2015, a trial decision from Labrador took a very different approach to modern treaty interpretation and limited the consultation obligations existing in the context of the Muskrat Falls/Lower Churchill Falls development.[20] (The Nunatsiavut Government is appealing.)
- In March 2015, the Blueberry River First Nations filed a lawsuit in British Columbia Supreme Court that claims cumulative violations of its rights under Treaty 8 in northeastern British Columbia, with the lawsuit also implicitly challenging British Columbia's Site C hydroelectric project.

Each of these different areas functions against a backdrop of other pertinent developments:

- In 2010, the federal government issued its first rejection of the Taseko New Prosperity Mine based on a combination of its effects on the environment and on spiritual interests of an Aboriginal community. A subsequent reapplication was rejected in 2014.
- In November 2010, Canada issued a qualified endorsement of the United Nations Declaration on the Rights of Indigenous Peoples. Discussion through subsequent years has continued to pose questions on what legal significance that may have in the longer term or how it may affect Canadian Aboriginal rights jurisprudence.
- In December 2012, the Idle No More movement began emerging, initially in response to statutory changes contained within omnibus legislation (Bill C-45) but gradually taking on a variety of Indigenous rights issues.[21]
- In 2013, the Supreme Court of Canada released its decision in the *Manitoba Métis Federation* case, holding that there had been historic violations of Métis rights in land granting processes.[22] A case on jurisdiction in relation to Métis issues is continuing up through the courts, with the Supreme Court of Canada having granted leave on the case in November 2014.[23]
- In 2013 and 2014, the devolution of powers and resource revenues to the Northwest Territories moved ahead, along with a major resource revenue sharing arrangement with

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[18] *Wabauskang First Nation v. Minister of Northern Development and Mines*, 2014 ONSC 4424 (Div. Ct.)
[19] *First Nation of Nacho Nyak Dun v. Yukon (Government)*, 2014 YKSC 69.
[20] *Nunatsiavut v. Newfoundland and Labrador (Department of Environment and Conservation)*, 2015 NLTD(G) 1.
[21] For an excellent history of the Idle No More movement, see Ken Coates, *#IDLENOMORE and the Remaking of Canada* (Regina: University of Regina Press, 2015).
[22] *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623.
[23] *Daniels v. Minister of Indian Affairs and Northern Development*, 2013 FC 6, varied 2014 FCA 101, leave granted 20 November 2014 (SCC File No 35945).

First Nations that is layered on top of resource revenue shares under modern treaty arrangements.

- In May 2014, Shawn Atleo resigned as National Chief of the Assembly of First Nations amid controversy over education reform legislation. Perry Bellegarde was elected as the new National Chief in December 2014.
- In June 2014, Vancouver City Council formally voted to acknowledge that the City of Vancouver is on unceded Aboriginal territory.
- In December 2014, New Brunswick introduced a fracking moratorium, partly to deal with issues related to consultation with Indigenous communities. There had been violent protests in 2013.
- In January 2015, the proposed Pacific Trail Pipeline received the support of the last of the sixteen First Nations along its 480-km route for the transportation of liquid natural gas (LNG).
- Formal consultations on modernization of the Indian Oil and Gas Regulations that govern on-reserve oil and gas development that commenced in 2008 continued throughout the time period, with hopes of concluding the process in mid-2015.
- In March 2015, the British Columbia government decided not to proceed with the appointment of a new treaty commissioner, with some suggesting that the province will be looking for new ways to move forward with outstanding land claims negotiations. Weeks later, an agreement-in-principle was signed to move negotiations with several Vancouver Island communities to the final stage of negotiations.

These lists represent just a portion of what has been going on, particularly focused toward issues related in some manner to natural resource development. Any impressions readers had that there is a lot of action on Aboriginal issues are right. The question now is how to assemble this variety of very significant developments into more of a trajectory of what is going on.

The Duty to Consult and Resource Development

A key part of the legal trajectory on Aboriginal rights and their interaction with resource development arises from the duty to consult doctrine. The Macdonald-Laurier Institute published a full paper on the duty to consult and resource development last year, so those seeking fuller background on it should refer to that report.[24] In brief, though, the duty to consult doctrine has developed in a particular form in the Canadian courts since the *Haida Nation* decision in 2004.[25]

The transformative aspect of the *Haida* decision was that the Supreme Court of Canada articulated that there is a proactive duty on governments making administrative decisions that

[24] Dwight Newman, "The Rule and Role of Law: The Duty to Consult, Aboriginal Communities, and the Canadian Natural Resource Sector" (Macdonald-Laurier Institute, May 2014). See also Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich, 2009); Dwight G. Newman, *Revisiting the Duty to Consult Aboriginal Peoples* (Saskatoon: Purich, 2014).

[25] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2003] 3 SCR 511.

may impact on Aboriginal or treaty rights[26] to consult with the potentially impacted Aboriginal communities before making the decision. In the post-*Haida* case law, both the honour of the Crown and the section 35 aspiration to reconciliation demand that governments consult before they cause negative impacts on Aboriginal and treaty rights, even where there remains uncertainty on the scope of the right.

The more specific requirements of consultation depend on the circumstances and are not always easy to determine. But they vary based on the *prima facie* strength of the right at issue and the degree of adverse impact on the right.[27] The requirements may include accommodation (not well defined) in some circumstances, although the courts have also consistently said that the duty to consult is not to be a legal veto power held by Aboriginal communities.[28]

As an example of the courts not always foreseeing the actual consequences of their decisions, the duty to consult stands out. Although the court judgments were all about governments being subject to the duty to consult—and governments responded by developing various policy regimes to carry out consultation—the main impact of the duty to consult has arguably been to empower some Aboriginal communities in the context of private negotiations.

Precisely what is required under the duty to consult is uncertain, because industry project proponents are not sure if governments will meet its requirements, and because any questions about that could give rise to legal delays, it has become common for industry to negotiate directly with Aboriginal communities in whose traditional territories they seek to operate.

The negotiation of an Impact Benefit Agreement (IBA) or other type of agreement will typically offer various benefits to an Aboriginal community in exchange for a "support clause" under which the community agrees not to raise duty to consult issues with governments or in the courts.[29] Such agreements may provide benefits like contracting opportunities or training, in addition to direct compensation, and thus may foster longer-term economic possibilities. They may also contain governance regimes on matters like environmental issues—privately negotiated between industry and a community.

What IBAs do, though, is render any later government consultation irrelevant and simply achieve a win-win solution without government involvement. While the courts were creating a legal regime concerned with consultation between the Crown and Aboriginal communities, what they have done is provide the incentives for privatized negotiation of various matters on the intersection of Aboriginal rights and resource development.

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[26] This was an extension of *Haida* in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 SCR 388.

[27] For the basic spectrum analysis, see *Haida Nation*, *supra* note 25 at paras .43-45.

[28] *Ibid.* at para. 48. The same point has been put repeatedly in the case law; for other references, see Newman, "The Rule and Role of Law", *supra* note 24.

[29] For discussion, see Dwight Newman, *Natural Resource Jurisdiction in Canada* (Toronto: LexisNexis, 2013) at 99-101.

These regimes have had very tangible economic benefits for some communities. Some communities are brining in literally hundreds of millions of dollars under IBAs. Some small law firms have negotiated hundreds of millions of dollars of IBAs. But the big irony is that these benefits are attained precisely by working around the uncertain, unwieldy law of the duty to consult. Some lawyers are even very clear with their clients in Aboriginal communities that they want them to ensure that they never speak with government officials in any manner that could be construed as consultation. If governments are able to complete something that meets the requirements of the duty to consult without providing tangible benefits to communities—something that is entirely possible—a community that speaks with government instead of industry is left out in the cold.

There are thus some real unintended consequences of the duty to consult. Some of these are arguably positive when Aboriginal communities attain real benefits. Some are more nuanced or more troubling. To mention just some examples, different industry players are very differently set up in terms of their ability to enter into IBAs or similar agreements, depending on their role in the industry and their size. Junior exploration companies struggle by comparison to major resource companies.[30] Thus, one impact of this developing system is that, as is often the case with new government regulation, big business may actually be able to derive advantages from the regulation, while smaller entrepreneurs who have been the historically heartbeat of Canadian mineral exploration struggle—which may have longer-term impacts on mineral discovery in Canada.

Similarly, different Aboriginal communities are very differently situated in terms of their readiness to enter into these sorts of agreements—or their geographical luck in terms of the presence of resources on their traditional territories. The system of IBAs benefits some communities, but only some. Inequalities as between different Aboriginal communities arising from this reason and other reasons will be an important future policy issue.

Although part of the ongoing development in the context of the duty to consult is in an areas guided by the law but outside the law itself, there have also been significant ongoing court decisions. Indeed, duty to consult litigation has actually replaced a lot of other Aboriginal rights litigation over the past decade, as all players have tried to sort out various facets of it, and in light of a reality that it is now often more favourable for an Aboriginal community not to resolve its main claim but to keep uncertainty present so as to foster ongoing arrangements structured in light of the duty to consult.

Some of this litigation simply saw the Supreme Court of Canada clearing up points that had not been clear before. The *Rio Tinto* case in 2010, in particular, saw the Court explaining that how governments meet the duty to consult is effectively up to them.[31] In the context of decisions about the role of administrative boards or tribunals in connection the duty to consult, governments set the mandates of those boards and tribunals, which can include reviewing consultation efforts, actually carrying out consultation, or having nothing to do with consultation.

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[30] See *e.g.* Newman, *Revisiting the Duty to Consult*, *supra* note 24 at 135-36.
[31] *Rio Tinto*, *supra* note 5.

But governments need to ensure, then, that the duty to consult, if not met by a board or tribunal, is met in some way.

Other decisions engaging with aspects of the duty to consult during this time period, though, have arguably seen the courts generating new uncertainties. In the same year as *Rio Tinto*, the Supreme Court of Canada's complex, divided decision in the *Little Salmon* case also saw it enunciating the idea that the legal duty to consult continues to exist in some form even when all parties have signed a modern treaty agreement that purported to exhaustively define consultation arrangements between the Yukon government and First Nations.[32] That decision created significant uncertainties for the Yukon government and has also seemed to start a process of undermining industry perceptions of the Yukon investment climate.[33]

In terms of other new uncertainties, in *Rio Tinto* itself, the Court went out of its way to say that whether legislative action triggers the duty to consult is an unresolved question.[34] The Idle No More movement emerged in late 2012 partly out of an idea that the federal government should consult First Nations across Canada before passing a law that they saw as impacting on their rights. Shawn Atleo's resignation as National Chief of the Assembly of First Nations in 2014 resulted partly from disagreements within Aboriginal communities themselves on to what extent the government had to consult them on reforms to improve First Nations education.

This question of whether there is a legal duty to consult in the context of legislative action has remained a key uncertainty that has very significant policy implications. In December 2014, a trial court released an enormously complex judgment suggesting that some phases of the process moving toward legislation cannot trigger the duty to consult, but others can.[35] That decision is under appeal, and the uncertainty continues, in ways that have some paralyzing effects on government policy-making when governments do not know if they can move forward on statutory reforms or not.

Over this time period, the duty to consult has also seemed to move in some different, and possibly unexpected directions. Most significantly in this vein, the *Ross River* decision in 2012 saw the Yukon Court of Appeal effectively order the Yukon government to redesign its mining legislation so as to create new opportunities for consultation.[36] The next year, the Supreme Court of Canada denied leave to appeal this judgment, making it the final judgment on the point. It seems to change the application of the duty to consult so that it no longer applies just to government decisions made under the law but may require changes to the design of the law

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[32] *Little Salmon, supra* note 6.

[33] Some of these issues were brought to public attention by an op ed: Yule Schmidt, "When 'Final Land Claims' Aren't Actually 'Final'", *National Post* (25 February 2014). For background on developments in Yukon over recent years, see Dwight Newman, "Evolution of Yukon's Aboriginal Law and the Goal of Reconciliation, A 360 Degree Perspective" (Action Canada, September 2014). Malcolm Lavoie and Dwight Newman are currently completing a research paper on the impacts on Yukon industry of legal uncertainty arising from Aboriginal and treaty rights case law.

[34] *Rio Tinto, supra* note 5 at para. 44.

[35] *Courtoreille, supra* note 10.

[36] *Ross River, supra* note 7.

itself. In that respect, there are possibly significant implications for the resource sector in various contexts.

That said, the Saskatchewan Court of Appeal has recently issued a first appellate-level decision on a somewhat related issue that may suggest limits to these implications. In the *Buffalo River Dene* case, in a treaty lands context in Saskatchewan's oil sands, the Saskatchewan court held that an initial disposition of mineral rights did not trigger a duty to consult, until the developer applied to carry out work that impacted on the surface and thus potentially impacted on treaty rights.[37]

Indeed, in several major recent court decisions, Aboriginal communities have lost on major duty to consult issues. Where governments have been responsibly attempting to follow the law on duty to consult and been developing reasonable processes, their efforts are being accepted by courts as meeting their legal responsibilities.[38] Courts are trying to make the law work in sensible ways, including in the context of projects that have effects on multiple traditional territories.

This fall, several First Nations will pursue in the Federal Court of Appeal duty to consult cases related to the approval last year of the Northern Gateway Pipeline. Contrary to some media hype and the views of academic activists, and though time will tell, there are actually many good foundations for the courts to approve of the Northern Gateway process as having met the pertinent legal duty to consult requirements.

The legal trajectory in this area is nuanced, but it certainly sees the courts trying to make the duty to consult work sensibly in a manner sensitive to Aboriginal and treaty rights but also sensitive to what is practically possible.

Aboriginal Title and Resource Development

In the context of Aboriginal title, this five-year period has seen a major development in the context of the *Tsilhqot'in* decision and the Supreme Court of Canada's 2014 interpretation of the law on Aboriginal title and historic first-ever declaration of Aboriginal title in Canada.[39] That decision has also been the subject of a past Macdonald-Laurier Institute report that discusses it in more detail,[40] but several key features are important to mention here. The Supreme Court's decision actually follows past case law on the Aboriginal title test fairly closely, but it applies the test in a manner such that a historically mobile community can meet the test. Whether that was possible had been unclear, and the 2012 Court of Appeal decision had been skeptical on the

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[37] *Buffalo River*, *supra* note 12.

[38] See *e.g. Council of the Innu of Ekuanitshit v. Canada (Attorney General)*, 2014 FCA 189; *Adam v. Minister of the Environment*, 2014 FC 1185.

[39] *Tsilhqot'in Nation, supra* note 14.

[40] Kenneth Coates & Dwight Newman, "The End is Not Nigh: Reason Over Alarmism in Analyzing the *Tsilhqot'in* Decision" (Macdonald-Laurier Institute, September 2014).

point. The 2014 Supreme Court of Canada decision was thus significant in legal terms in showing that it was potentially possible for a historically mobile community to meet the test.

There are still strict evidentiary requirements to succeed on an Aboriginal title claim, and not all communities will be able to meet those easily or with respect to large areas of land. Contrary to a lot of sensationalism about the judgment, the Tsilhqot'in themselves were awarded only 40% of their claim area, which was itself only 5% of their traditional territory, meaning that the title area is much smaller than the traditional territory that was shown in some media reports.

However, the legal shift arising from the decision does still suggest that more communities than might have been thought to will have viable title claims. That, in turn, impacts on the current consultation requirements with those communities, because of the increased *prima facie* strength of their claims. So, there are significant impacts not just for the Tsilhqot'in themselves but for other communities with outstanding title claims.

However, the Court also does some things in the judgment that create uncertainties on the meaning of Aboriginal title, in ways that have potentially negative prospects for Aboriginal communities themselves. The Court, in discussing its theories about the essentially collective nature of Aboriginal title, elaborates the notion that Aboriginal title is held for not just the present generation but future generations as well and that title lands cannot be used in a manner that harms their value for future generations.[41] The meaning of that restriction and the implications for whether certain types of resource development are actually prohibited are not clear. This seemingly leaves developments subject to future court challenges by those disagreeing with a community's decision to engage in certain kinds of economic development, whether dissenting community members or perhaps even external busybodies.[42] The Court also does not make clear whether Aboriginal communities holding Aboriginal title can develop private land ownership systems within that title land, which also potentially limits economic options for communities.[43]

The Court also goes out of its way to make some statements that amplify the effects of uncertainties for development on land subject to Aboriginal title claims. Aboriginal title lands are subject to provincial regulation and even to justified infringements (overrides, analogous to expropriation of other land) on the title based on a specific legal test, and the court elaborates on that test to some extent,[44] but with a lot of uncertainty remaining on what would meet it. Then the Court says not only that consent of the community would be sufficient to address any uncertainties but also that "if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."[45]

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[41] *Tsilhqot'in Nation, supra* note 14 at para 74.
[42] See Coates & Newman, "The End is Not Nigh", *supra* note 40 at 15.
[43] *Ibid.* at 15-16. On some of the economic implications of the type of property rights created through the Court's Aboriginal title jurisprudence, see also Tom Flanagan, "Clarity and Confusion? The New Jurisprudence of Aboriginal Title" (Fraser Institute Centre for Aboriginal Studies, April 2015).
[44] *Tsilhqot'in Nation, supra* note 14 at paras. 77-88, 125-37.
[45] *Ibid.* at para 92

The possibility that projects might later get cancelled based on a set of unclear legal tests is not one that inspires investor confidence to invest the billions of dollars of investment capital that Canada's resource sector needs in order to contribute to prosperity for all.

Understandings of the *Tsilhqot'in* judgment have varied widely since it was announced, perhaps because of some of the unclear features of what the Court ended up writing—with negative impacts on industry, on Canada generally, and on Aboriginal communities. Right now, the Court's imprecise phrasing of parts of the *Tsilhqot'in* judgment is arguably having some challenging implications for resource development, at least in areas of the country with outstanding title claims.

The legal trajectory of Aboriginal title over the past five years has seen the significant enhancement of the position of Aboriginal communities with outstanding title claims but also the creation of significant uncertainties. And these uncertainties may seem likely to continue, out of a particular mix of factors:

- Some of these have driven negotiating positions far apart, and negotiation processes are not working swiftly. Expectations are perhaps farther apart than ever before. And, in some ways, some parties have incentives to generate rather than overcome uncertainties, as discussed in the last section on the duty to consult.
- Political dynamics make governments reluctant to take some of the steps that they could to pursue increased legal clarity, though the last section of the paper will return to some of their real options.
- Some of the resulting questions may simply get sorted out gradually in the courts in the years ahead, but the reality is also that very few Aboriginal title claims end up in the courts and on a very gradual basis. So, judicial development of the law is not helping to clarify matters as quickly as it might in some other areas.

A very recent development has suddenly opened a wide range of possibilities in terms of upcoming Aboriginal title litigation and some different ways that it could play out. In mid-April 2015, the British Columbia Court of Appeal held that it is possible for Aboriginal communities to sue private parties based on previously unproven Aboriginal title claims, setting the stage for a possible lawsuit against Alcan based on riparian rights allegedly stemming from a particular community's previously unproven Aboriginal title.[46] Although this decision remains subject to possible appeal, any legal developments of that sort may open a wide range of possibilities.

First, at the most obvious level, there come to be increased prospects for Aboriginal communities to sue private companies directly over Aboriginal title and Aboriginal rights questions. That may create increased incentives for industry to negotiate with Aboriginal communities, or may simply drive industry away from some regions.

Second, though, thinking further ahead, there could be further dynamics arising from such determinations. Right now, industry largely does not have standing to litigate on Aboriginal title

[46] *Saik'uz First Nation and Stellat'en First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154.

and Aboriginal rights questions. Once there are potential direct impacts on industry, industry could conceivably become more involved in litigation on these matters, including through seeking pre-emptive declarations authorizing industry activity.

That kind of litigation might arise, even though it would seem highly undesirable from the standpoint of deeper societal reconciliation. There are a wide range of possibilities for how some of these developments may move forward, with a wide range of possible policy outcomes.

Legal Over-Reaches by Aboriginal Communities

The pursuit of some claims through the courts can have unexpected—and negative—outcomes. Aboriginal communities are sometimes subjected to a chorus of suggestions that they can get farther and farther ahead through more spending on lawyers and more litigation. The false mythology of an unbroken string of wins, discussed in the introduction, feeds into this idea. But Aboriginal communities have over-reached in some cases, sometimes with negative results that have set back their position from what it would have been if they had never litigated.

The *Grassy Narrows* decision of the Supreme Court of Canada is an example of the point. While the Aboriginal community that pursued the case wanted only to argue some quite particular aspects of Treaty 3 as it bore on parts of northwestern Ontario, the case ended up being a chance for the Supreme Court of Canada to reinforce provinces' roles in regulating and ability to impact on treaty rights. In doing so, the Court extended propositions from *Tsilhqot'in* to the treaty rights context, while silently overturning past case law on the point in the treaty rights context.[47] The effort to use Treaty 3 in highly constraining ways against the province of Ontario ended with provincial rights strongly affirmed.

Further, more recent attempts to litigate on Treaty 3 have also seen a setback for Aboriginal claims. In August 2014, the Ontario Divisional Court held that Treaty 3 in northwestern Ontario does not create rights to resource revenue sharing or to shared decision-making and thus did not ground consultation obligations arising from such rights.[48] The Wabauskang First Nation, which litigated the point, may not have done so effectively. In any case, there is now a precedent standing against resource revenue sharing claims in the context of a numbered treaty with close analogies to the various other numbered treaties of the late 1800s and early 1900s, possibly setting back the arguments of Aboriginal communities across the prairies. Although the Wabauskang First Nation is appealing, unless it has something new in terms of evidence at the appeal, it may get only an appellate judgment reinforcing the point.

Aside from the variety of recent duty to consult cases discussed earlier that Aboriginal communities have lost, the Hupacasath claim for consultation prior to the adoption of an investment agreement between Canada and China also stands out as a recent loss for Aboriginal communities. Frankly, the claim was implausible to start with, and the courts ended up simply

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[47] *Grassy Narrows, supra* note 17 at para. 53 (citing *Tsilhqot'in Nation, supra note 14,* just weeks after its release, while ignoring the precedent speaking specifically to the point, *R. v. Morris*, 2006 SCC 59. [2006] 2 SCR 915.

[48] *Wabauskang First Nation v. Minister of Northern Development and Mines*, 2014 ONSC 4424 (Div. Ct.)

adopting very significant language constraining the type of causation needed in the context of duty to consult claims, with the case thus giving the courts an opportunity to constrain future cases.[49]

Although there is not one simply legal trajectory, and there are many things going on at the same time, there is a real possibility that *Tsilhqot'in* should be considered as having marked a sort of peak for Aboriginal rights claims in the courts, at least in the short term. Though time will tell on some claims, there is a real possibility that Aboriginal communities might be better situated right now to build on their legal victories through serious negotiations with governments and industry. All parties should arguably take the case law of recent years as an encouragement to try to come together around some common understandings, more so than to keep fighting in the courts. A key advantage of negotiated processes, of course, is that more issues can be opened up, on which the law would not necessarily have anything to say, so it is possible to deal with a wider range of policy aspects. Real work now to further the economic opportunities of Aboriginal communities by drawing them into natural resource development processes could help to establish greater economic prosperity and sustainability into the future.

Emerging Flashpoints

There are some big legal questions ahead. One relates to the meaning of modern treaties, and that is one with huge significance to future negotiation processes. In recent months, there have been decisions from different trial courts that have taken radically differing approaches to the interpretation of modern treaties.[50] The issue was a vexing one for the Supreme Court of Canada in a pair of cases in 2010,[51] and there are lingering questions that are now being fought out. What is important to realize here is that the principles the courts adopt will affect the degree to which continuing to negotiate serves the objectives of either or both sides. Getting the principles right on that issue is immensely important.

At the same time, there are a variety of reasons why there might be emerging flashpoints rather than emerging solutions of the sort referenced in the last section. The courts have developed some of their Aboriginal rights doctrines that affect resource development in ways that encourage parties to perpetuate or develop uncertainties. In the context of the duty to consult, Aboriginal communities across the numbered treaty areas can press for better economic opportunities in their often struggling communities by pressing arguments that there is uncertainty on the historic numbered treaties and whether they transferred subsurface minerals or only shared land "to the depth of a plough".[52] Perry Bellegarde began making those arguments of "unfinished treaty business" in Saskatchewan as Chief of the Federation of Saskatchewan

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[49] *Hupacasath*, *supra* note 11.

[50] There are entirely contrasting approaches in *Nacho Nyak Dun*, *supra* note 19 and *Nunatsiavut*, *supra* note 20.

[51] *Little Salmon*, *supra* note 6; *Moses*, *supra* note 16.

[52] See Newman, *Natural Resource Jurisdiction*, *supra* note 29 at 93-94. On the longer history of disagreement about treaty terms and implementation, see Jean-Pierre Morin, "Perceptions of Implementation: Treaty Signatory Views of Treaty Implementation", in Jerry P. White et al., *Aboriginal Policy Research: Moving Forward, Making a Difference*, vol. IV, 123.

Indian Nations (FSIN) as part of a push for resource revenue sharing. He continues to push them as newly elected National Chief of the Assembly of First Nations (AFN). The creation of new uncertainties has been seen as a way of furthering opportunities for Aboriginal communities, rather than the focus being always on optimal policy approaches.

At the same time, out of a variety of reasons, it has become very difficult to get major infrastructure projects done in Canada. Amongst others, the impacts of Aboriginal title and of the duty to consult on long linear infrastructure projects are subject to immense lack of clarity. Those trying to get projects done may end up in the years ahead in more confrontational stances with Aboriginal communities if some greater clarity cannot be achieved that makes it possible to do business in Canada. The possibility of more confrontational stances may be just further enhanced by the new possibilities of direct litigation between Aboriginal communities and industry that seem to be emerging.

Policy Recommendations

Thinking of the longer legal trajectory of five years rather than just of the latest cases helps to contextualize somewhat the developments that are going on. Drawing together these developments in one place is hopefully informative for readers in itself. However, the different parts of the analysis thus far have pointed to various challenges There will be a range of policy options for confronting some of these challenges.

Some Canadians strikingly remarkably unaware of the significant legal rights held by Aboriginal communities, but many others are affected by incorrect myths of Aboriginal communities having an unbroken string of victories in the courts in recent years.

- When academics or the media inform the public about Aboriginal and treaty rights issues, they should strive to do so as accurately as possible.
- Think tanks have an important role in helping to ensure that policy-makers and the public have accurate information. Those concerned for Canada's future should continue supporting think tanks that seek to play this role.

Aboriginal rights case law is impacting in major ways on Canada's natural resource sector, sometimes in ways reflecting unintended consequences of judicial determinations.

- Courts that are inevitably enmeshed in policy determinations on section 35 issues should consider the policy implications of their legal determinations.
- Courts should try to refrain from including ambiguous statements in their Aboriginal rights judgments. Legal scholars and others should work to try to clear up those ambiguities.
- Governments should consider taking reference cases to the courts to seek faster clarification of some of the ambiguities existing in this case law.

- Governments should ensure that courts that will deal with Aboriginal rights issues have judges on them with strong background knowledge of Aboriginal law, natural resources issues, and economic issues generally.

Negotiations stemming from the legal background of the duty to consult impact on different industry stakeholders and different Aboriginal communities very differently.

- Any discussions of resource revenue sharing should be engaged with the full range of policy implications of different models of resource revenue sharing.
- Industry associations and governments should work to lessen the burdens on smaller companies through providing appropriate forms of assistance to them around duty to consult issues.

There remains major legal uncertainty on whether the duty to consult applies in the context of legislative action.

- The litigation underway on this issue should be taken to appellate courts expeditiously.
- Jurisdictions that do engage in consultation on legislative action, such as Saskatchewan, should share lessons from that practice, and legal scholars should study successes and challenges of that practice.

Major uncertainties on the scope of Aboriginal title and its implications persist, with political actors reluctant to take some steps that they could and clarification through the courts being a very slow process, with the courts sometimes introducing new language that causes further confusion.

- Political actors should discuss more openly the strong legal position of governments and the legal tools available to governments.
- Governments should consider making use of their reference power to seek clarification from the courts on some questions more rapidly than those questions will otherwise be resolved.
- Industry should consider seeking preemptive declarations through the courts.
- Governments should consider elaborating policies or other statements concerning the meaning of ambiguous dimensions of judgments.
- Governments should consider making use of other legal tools, including their ability to justifiably infringe or override Aboriginal and treaty rights, and should develop policies around when they will use these tools in the public interest.

Some Aboriginal communities are pursuing legal cases that are over-reaching and not viable, with resulting long-term negative impacts on them or other Aboriginal communities.

- Aboriginal communities should consider carefully whether litigation is the best option in respect of a particular issue.
- Aboriginal communities should ensure that they are listening to voices that present the contents of Aboriginal law objectively and are not caught up in overoptimistic descriptions of their likely success on particular issues.

- Aboriginal communities should watch carefully what cases are being pursued by other communities, consider implications for them carefully, and take appropriate action.

The principles governing the interpretation of modern treaties are currently being significantly contested.

- Courts should consider the policy implications of adopting various approaches to interpretation of modern treaties. Legal scholars and advocates should work to make sure those issues are on the radar screen of courts dealing with these cases.

Incentives have been generated for some parties to perpetuate and expand uncertainties.

- Courts should consider the policy consequences of their judgments in this area and should specifically consider whether particular legal doctrines encourage or discourage resolution of issues.

It has become difficult to get some kinds of business done in Canada, particularly in developing major national infrastructure projects, and this may lead to frustration and confrontation in the years ahead.

- Industry should continue to develop its understandings of Aboriginal issues and work to engage proactively with Aboriginal communities and organizations.
- Industry should also consider whether there are new litigation options available to it or should consider intervening in litigation that is underway.
- Governments should continue to examine the barriers to business especially in areas like major natural resource infrastructure and work to ensure they provide support for projects in the public interest.